IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:03-cr-00077-JSM-TBM-ALL

SAMI AMIN AL-ARIAN, ET. AL

_____/

MOTION OF MEDIA GENERAL OPERATIONS
FOR LEAVE TO INTERVENE AND FOR ORDER ESTABLISHING
GUIDELINES FOR MEDIA ACCESS

Media General Operations, Inc. d/b/a *The Tampa Tribune* (hereinafter "the Tribune"), hereby files this Motion to Intervene and for Order Establishing Guidelines for Media Access and Supporting Memorandum in this matter. The Tribune seeks leave to intervene in these proceedings for the limited purpose of requesting that this Court enter an order establishing guidelines for media access to various judicial proceedings and records. Grounds for this motion are set forth in the following memorandum.

MEMORANDUM OF LAW

In February 2003, former University of South Florida professor Sami Amin Al-Arian, former University of South Florida instructor Sameeh Hammoudeh, Illinois resident Ghassan Zayed Ballut, and Hernando County resident Hatim Naji Fariz were charged in a fifty count indictment on numerous federal charges, including racketeering and conspiracy to commit murder. The indictment accuses these Defendants and others of supporting, promoting and fundraising for Palestinian Islamic Jihad, which the United States government previously has

declared a terrorist group. A Superceding Indictment was filed on September 21, 2004.

Trial of four of the named Defendants is scheduled to commence on April 4, 2005. A pretrial conference is scheduled for March 4, 2005. The charges against the Defendants, which detail an alleged worldwide conspiracy dating back as early as 1988, are matters of intense local and national public scrutiny. The Tribune anticipates that access issues will arise throughout this case and seeks to have this Court enter some preliminary guidelines on media access in order to lessen the disruptiveness of intervention motions throughout the course of the trial.

INTRODUCTION

As a member of the news media, the Tribune — a daily newspaper — has standing to intervene for the limited purpose of seeking access to judicial proceedings and records. *See, e.g., United States v. Ellis*, 90 F.3d 447, 449 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 964 (1997); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1561 (11th Cir. 1989) (intervening members of news media had standing to appeal scope of closure order); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983). The Tribune seeks an opportunity to address a number of important issues prior to the commencement of trial in this very significant litigation.

Specifically, the Tribune requests permission to inspect and copy all physical and documentary evidence published to the jury or admitted into evidence in the trial of this matter, including, without limitation, audiotapes and videotapes,

photographs, transcripts of recordings and translations. In addition, the Tribune seeks a court order establishing guidelines for media access to juror selection and jury information, as well as transcripts of bench conferences, sidebars and in chambers hearings.

Access to Audiotapes/Videotapes and Transcripts Thereof

The public enjoys a common law right to inspect and copy judicial records. The existence of such a right was recognized by the United States Supreme Court in *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978), in which the Court stated that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597. The decision regarding access is within the court's discretion, which must be exercised in light of the facts and circumstances of the particular case. *Id.* at 598. Notwithstanding this discretion, a presumption of openness attaches to judicial records, and this presumption in favor of public access must be balanced against any competing interest advanced. *Id.* at 602. *Accord Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983).

This right of access to judicial records generally has been justified by the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to judicial records. *See, e.g., United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981). "This right, like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the

legal system." *Newman,* 696 F.2d at 803. While the common law right is not constitutional in dimension, it "supports and furthers many of the same interests which underlie those freedoms protected by the Constitution." *United States v. Edwards*, 672 F.2d 1289, 1293 (7th Cir. 1891). Public scrutiny of judicial proceedings furthers the laudable goals of promoting community respect for the rule of law, providing a check on the activities of judges and litigants and fostering more accurate fact-finding. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994).

Although first recognized at a time when records were documentary in nature, the common law right of access to judicial records extends to records that are not in written form, such as audio and video tapes. *See In re Application of Nat'l Broadcasting Co.,* 653 F.2d 609, 612 (D.C. Cir. 1981). The common law right of access to judicial records likewise has been recognized by the Eleventh Circuit. *See United States v. Rosenthal,* 763 F.2d 1291 (11th Cir. 1985).

The Tribune acknowledges that the right to inspect judicial records is not absolute and that the Court must balance this right against other competing interests, most notably the accused's right to a fair trial. *Newman,* 696 F.2d at 796. However, other courts have observed that a number of following factors are relevant in deciding whether the media may obtain copies of audio tapes or videotapes admitted into evidence in a criminal case for broadcast to the public:

> (1) whether the information would be "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of . . . . a case";

(2) whether the media seeks to use court "files . . . as reservoirs of libelous statements for press consumption . . . . or as sources of business information that might harm a litigant's competitive standing";

(3) whether the court had already "permitted considerable public access" to the contents of the records in question, (*e.g.,* by way of printed transcript, as opposed to a tape recording);

(4) whether further access would appreciably enhance public understanding of an "important historical occurrence"; and

(5) whether allowing access would prejudice the due process rights of a criminal defendant.

Edwards, 672 F.2d at 1293. *Accord Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983) (courts look to factors such as "whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, whether access is likely to promote public understanding of historically significant events, and whether the press has already been permitted substantial access to the contents of the records"). Moreover, courts should deny access only on the basis of articulable facts, as opposed to unsupported hypothesis or conjecture. *See, e.g., Grove Fresh Distributors, Inc.,* 24 F.3d at 897.

Upon information and belief, the Government intends to offer into evidence portions of the 21,000 hours of surreptitiously recorded conversations between one or more Defendants and their alleged indicted and/or unindicted co-conspirators that span almost a decade of surveillance. In addition, it is believed that the Government will offer into evidence videotapes depicting activities of one or more Defendants prior to their arrest. On September 12, 2003, the Court ordered that access to the secretly recorded audiotapes, although declassified, be limited to

certain attorneys, defendants, interpreters, FBI agents, law clerks, paralegals and secretaries.

The Tribune seeks access to any videotapes or audiotapes that are published to the jury or admitted into evidence at trial, as well as any transcripts of such recordings that are provided to the jury or otherwise published at trial. *See, e.g., United States v. Martin,* 746 F.2d 964, 968 (3d Cir. 1984) (permitting access to transcripts that were provided to jury although not admitted into evidence); *United States v. Abegg*, 1993 W.L. 246145 (S.D. Fla. 1993) (requiring government to make arrangements to have copies of videotapes and audiotapes that are offered into evidence made available immediately after introduced into evidence). Such items will aid in the public's understanding of the proceedings, particularly given the limited number of members of the public who will be able to attend the trial in person. Moreover, the trial presumably will be open to members of the press and they will be permitted to report on the audio content of the tapes and describe the corresponding video images. Clearly, the public interest in monitoring judicial proceedings, particularly proceedings of such global significance, supports a presumption in favor of access, as the public interest can be vindicated best by the release of complete and accurate transcriptions. *Martin,* 746 F.2d at 968-69.

To the extent that the parties argue that the jury may be affected by the public dissemination of this material, the Tribune respectfully would submit that such speculative problems can be addressed through strict instructions and close monitoring of the jury. *See, e.g., In re Application of Nat'l Broadcasting Co.,* 635

F.2d 945 (2d Cir. 1980) (judge is entitled to rely on the jury's observation of admonition to avoid exposure to media reports of the trial). This Court should accord significant weight to the impact of "skillfully conducted *voir dire* examination as an antidote for the effects of publicity." *Martin,* 746 F.2d at 970. As the Third Circuit has observed:

> Since the inception of our criminal justice system, courts have acknowledged the utility of skillfully conducted voir dire as a means of ascertaining a prospective juror's impartiality. . . . This "testing" by voir dire remains a preferred and effective means of determining a juror's impartiality and assuring the accused of a fair trial.

Id. at 973. Given the nature of the publicity that has been afforded already to the Defendants and charges in this case, the Court undoubtedly will be asked to employ protective measures to ensure an impartial jury, irrespective of the release of these judicial records. Those measures also will assist in insulating the Defendants from any suggested adverse impact of the release of these judicial records.

Access to Translations Offered into Evidence

In addition, because many of the surreptitiously recorded conversations between the Defendants and others were in Arabic, it is anticipated that the Government and/or Defendants will offer into evidence Arabic to English translations of the audio taped conversations. In addition, the Tribune understands that the Government or Defendants may offer into evidence translations of other materials, including discovery materials, into Arabic and/or Hebrew. In *United States v. Hernandez*, 124 F. Supp. 2d 698 (S.D. Fla. 2000), the media sought access to the English translations of a 1,350-page, three-volume notebook of decrypted

computerized data in Spanish. The court held that the media intervenors were entitled to the translations upon their admission into the court record. *Id.* at 704-05. *Accord United States v. Noriega,* 752 F. Supp. 1037, 1040 (S.D. Fla. 1990). For all of the reasons set forth above, the Tribune requests access to any such translations, whether written or oral, that are admitted into evidence at trial or provided to the jury.

Access to Jury Selection and Jury Information

The Tribune asks this Court to enter an order addressing media access to jury selection and juror information, including juror names and addresses. When examining the public's right to access public trials, the Eleventh Circuit has "found that 'the starting point in such a discussion is the proposition that, absent some exceptional circumstances, trials are public proceedings'." *Brown v. Advantage Eng'g, Inc.,* 960 F.2d 1013, 1015 (11th Cir. 1992) (quoting *Wilson v. American Motors Corp.,* 759 F.2d 1568, 1569 (11th Cir. 1985)). Access to a criminal trial is unequivocally the First Amendment right of the public and the press. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 579-80 (1980); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983). As the Eleventh Circuit has opined, "open proceedings may be imperative if the public is to learn about the crucial legal issues that help shape modern society. Informed public opinion is critical to effective self-government." *Newman v. Graddick,* 696 F.2d 796, 800 (11th Cir. 1983).

The First Amendment right of access to criminal trials extends to the voir dire examination of potential jurors. *See, e.g., Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501 (1984). Since its inception, jury selection has "presumptively been a public process." *Id.* at 505. Such "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 508. Moreover, "the right of access to voir dire examinations encompasses equally the live proceedings and the transcripts which document those proceedings." *See United States v. Antar*, 38 F.3d 1348, 1359 (3d Cir. 1994).

In the context of voir dire proceedings, *Press Enterprise* dictates that any closure order "must be rare and only for cause shown that outweighs the value of openness." 464 U.S. at 509. In other words, a court ordering closure of a voir dire transcript must make *specific* findings that an overriding interest compels the limitation on the right of access and that the limitation is the least restrictive alternative. *See Antar*, 38 F.3d at 1363.

The Tribune respectfully submits that, like voir dire examination, the names and addresses of jurors also are entitled to a presumption of openness. *See In re Baltimore Sun Co.*, 841 F.2d 74, 75-76 (4th Cir. 1988). Public access to the voir dire transcript and the names of the jurors enhances the judicial process. "Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system." *In re Globe Newspaper Co.*, 920 F.2d 88, 94

(1st Cir. 1990). To be sure, "the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity." *Baltimore Sun*, 841 F.2d at 76; *see also Globe Newspaper*, 920 F.2d at 97-98 ("While anonymity is acceptable in the exceptional case where there is a particular need for it, the prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness.").

Likewise, absent a threat of jury tampering, or risk of personal harm to individual jurors, or any other harm that could affect the administration of justice, the Tribune would submit that information concerning jurors' names and addresses should be available for public access. As this Court is aware, exceptional circumstances that could form the basis of closure of a voir dire transcript or the venire list do not include "the mere personal preferences or views of the judge or jurors." *Globe Newspaper*, 920 F.2d at 97. While the Court may "sympathize with a juror's desire in a publicized criminal case such as this was to remain anonymous, the juror's individual desire for privacy is not sufficient justification by itself to withhold his or her identity." *Id.* at 98.

Consequently, the Tribune respectfully requests that it be provided access to the voir dire proceedings, a transcript of same and identifying information (names and addresses) concerning those who appear for voir dire examination, as well as those who are actually seated as jurors in the case.

Access to Transcripts of Bench Conferences and Sidebars

The Tribune acknowledges that the right of access to sidebar colloquies "is not a right of contemporaneous presence." *In re Application of Daily News (United States v. Gotti),* 787 F. Supp. 319, 326 (E.D.N.Y. 1992). In *United States v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978), the former Fifth Circuit upheld the decision of the trial court to withhold transcripts of a number of sidebars, observing:

> Bench conferences between judge and counsel outside of public hearing are an established practice. . . and protection of their privacy is generally within the court's discretion. No abuse of discretion with respect to the conduct of the bench conferences is demonstrated by the appellants. Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion.

Id. at 1210. However, subsequent decisions of federal courts have recognized that the common law right of access applies under some circumstances to certain sidebars or bench conferences. For example, in *United States v. Smith*, 787 F.2d 111 (3d Cir. 1986), the court applied the right of access to sidebar conferences in which evidentiary or other substantive rulings were involved, as opposed to conferences that only related to collateral matters at trial:

> A sidebar conference at which a question to a witness was proffered and an objection sustained is an integral part of a criminal trial. Thus, if there has been no contemporaneous observation, the public interest in observation and comment must be effectuated in the next best possible manner. This is through the common law right of access to judicial records. By inspection of such transcripts, the public, usually through the press, can monitor, observe, and comment upon the activities of the judge and of the judicial process. We hold, therefore, that the common law right of access to judicial records enunciated in *Criden I* is fully applicable to transcripts of sidebar or chambers conferences in criminal cases at which evidentiary or other substantive rulings have been made.

Id. at 114-15. Thus, the court did not err in ruling that the transcripts of the sidebars should be disclosed where the person opposing access failed to demonstrate that the factors opposing access outweighed those in favor of access. *Id.* at 116. In *United States v. Valenti,* 987 F.2d 708 (11th Cir. 1993), the Eleventh Circuit recognized that "[e]ven where a court properly denied the public and press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed." *Id.* at 714. The Tribune respectfully would request that this Court propound guidelines regarding the manner in which sidebar conferences will be conducted and the Tribune's right to be heard on the issue of its entitlement to transcripts thereof.

CONCLUSION

As the United States Supreme Court recognized in *Craig v. Harney*, 331 U.S. 367 (1947), what transpires in the courthouse is public property – therefore, criminal proceedings should be open unless there are compelling reasons for closure. Because *Richmond Newspapers* requires the openness of criminal proceedings, and because so much information is already publicly known about the Al-Arian investigation, no compelling reason for closure is present in this case. However, the Tribune anticipates that access issues can and will arise throughout the course of this trial and files this motion to intervene in the hopes of obtaining at least some preliminary guidelines regarding access to various stages or components of this trial. Therefore, the Tribune respectfully requests that this Court grant the

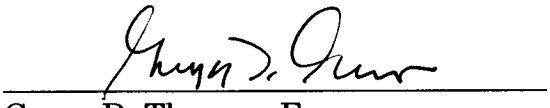
Tribune leave to intervene and access to court papers and proceedings, including transcripts, audio and videotapes, translations, jury selection and juror information.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(d), the Tribune respectfully requests oral argument on this motion and estimates that the argument will take an hour.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Gregg D. Thomas, Esq.
Florida Bar No. 223913
Susan Tillotson Bunch, Esq.
Florida Bar No. 869562
100 North Tampa Street, Suite 4100
Post Office Box 1288
Tampa, Florida 33601-1288
(813) 227-8500
Fax: (813) 229-0134

Attorneys for Intervenor
Media General Operations

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 25, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Terry A. Zitek
Kevin T. Beck
Stephen N. Bernstein
M. Allison Guagliardo
Bruce G. Howie
William B. Moffitt
Linda G. Moreno
Wadie E. Said

Attorney

2577573_v3